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No. 00-1338

In the Supreme Court of the United States

DIANA HARVEY JOHNSON, AKA
DIANE HARVEY JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has established plain error in her mail fraud convictions for depriving the State of Georgia and its citizens of their intangible right to her honest services as a state legislator, in violation of 18 U.S.C. 1341 and 1346, because her conduct allegedly did not violate state disclosure law and because she allegedly lacked notice that her fraudulent scheme, which involved the receipt of payments from the State without disclosure of her conflict of interest, constituted a deprivation of honest services.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2001. The petition for a writ of certiorari was filed on February 21, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on five counts of defrauding the State of Georgia and its citizens of their right to her honest services and of their money and property through the use of the United States mails, in violation of 18 U.S.C. 1341, 1346, and 2. Petitioner was sentenced to 41 months' imprisonment, to be followed by three years' supervised release, fined $7500, and ordered to pay restitution to the State of Georgia in the amount of $21,606. The court of appeals affirmed. Pet. App. 1a-3a.

1. a. In 1994, petitioner, a Georgia State Representative, was the sole proprietor of a business located in Savannah, Georgia, named CAA Consulting Corporation (CAA). In early 1994, petitioner founded the Greater Savannah Black Tourism Network (Greater Savannah), a non-profit organization to promote black tourism in the Savannah area. Although petitioner controlled Greater Savannah from the outset and operated it from her company's offices, she represented herself to be a mere "Advisor" to this entity. Petitioner recruited most of Greater Savannah's Board members and selected its officers, including Betty Simmons, a state employee, as President and Chairman, and Julia Wright, a schoolteacher, as Treasurer. Gov't C.A. Br. 4-6.

In January 1994, petitioner met with Hanna Ledford, an official with the Georgia Department of Industry, Trade and Tourism (Department). Petitioner told Ledford about the black tourism network idea and said that she would get funding added to the Department's budget to pay for it. Within a few weeks, $5000 was added to the State's Supplemental Fiscal Year 1994

budget as a line item requiring the Department to contract with the "Georgia Black Tourism Network." On February 4, 1994, petitioner voted in favor of that budget. Gov't C.A. Br. 6-7. Greater Savannah promptly sent a letter to the Department proposing a $5000 contract with the State. The letter was sent in the name of Wright, Greater Savannah's Treasurer, even though Wright knew nothing about the proposal, and merely signed it at petitioner's request. On May 15, 1994, the Department entered into a contract with Greater Savannah for the $5000, money intended to pay for expenses related to the development of black tourism organizations in six cities in Georgia. Petitioner had Wright sign the contract. None of the Greater Savannah Board members knew anything about the state funding or the contract. Gov't C.A. Br. 7-8.

Shortly after Greater Savannah received the $5000 from the Department, petitioner wrote a Greater Savannah check in the amount of $2500 to her company, labeling the check as an "installment on loan."[1] The same day, petitioner wrote a CAA check to the Internal Revenue Service for a similar amount to pay her personal taxes. A few weeks later, petitioner caused another Greater Savannah check, for $1500, to be paid to her company for unspecified "services." During that period, petitioner had no contract with Greater Savannah and submitted no invoices. Gov't C.A. Br. 8-9.

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[1] Although Wright supposedly had sole authority over Greater Savannah's bank account, Wright wrote checks at petitioner's direction, gave petitioner pre-signed blank checks to use, and allowed petitioner to write and sign checks using Wright's name. Gov't C.A. Br. 8.

In May 1994, petitioner wrote a letter, again over Wright's signature, proposing that the Department pay Greater Savannah to prepare six African-American heritage brochures. Petitioner falsely told Ledford that Wright would do the work. On September 12, 1994, the Department entered into a $4200 brochure contract, which petitioner signed for Greater Savannah in the forged name of Wright. Over the next year, petitioner worked intermittently on the brochures. Although Department officials eventually recognized that petitioner was involved in work on the brochure contract, they never believed that she would be paid on that contract. Gov't C.A. Br. 9-10.

On November 30, 1995, Greater Savannah submitted to the Department a $4200 invoice, bearing the forged signature of Aileura Crawford, a CAA employee. On December 15, 1995, the State paid the $4200 to Greater Savannah. A week later, petitioner forged Wright's endorsement and deposited the check into the Greater Savannah bank account; she then forged Wright's signature to a Greater Savannah check paying the entire $4200 to CAA. Gov't C.A. Br. 10.

In September 1994, Greater Savannah proposed that the Department pay it $1800 to organize a workshop on multicultural tourism on December 6, 1994—another proposal letter submitted over the forged signature of Wright, who knew nothing about it. Petitioner actually arranged the workshop, and she spoke at it as a state legislator with no disclosure that she was being paid. Petitioner then directed Wright to sign a Greater Savannah invoice to the Department for $1700. The Department paid the invoice, and a few weeks later petitioner wrote and signed (using Wright's name) a Greater Savannah check funneling $1000 of this money to her company. Gov't C.A. Br. 10-11.

b. In early 1994, petitioner began organizing the Peach State Black Tourism Association (Peach State) as a nonprofit group that would promote black tourism throughout Georgia. Once again, petitioner controlled Peach State from the outset, while portraying herself as a mere "Advisor" and installing Simmons as Chairman and Wright as Treasurer. Gov't C.A. Br. 11-12.

During the summer of 1994, petitioner proposed that more than $300,000 be included in the Department's budget for Fiscal Year 1996 as a line item earmarked to Peach State. In the fall of 1994, petitioner was elected to the State Senate and also became Chairman of the Legislative Black Caucus (Caucus). She promoted the Peach State concept in the Caucus, and included it as the first item on the Caucus's economic development agenda that she sent to Governor Zell Miller in September 1994. Gov't C.A. Br. 10, 12.

In the fall of 1994, petitioner promoted the Peach State proposal in various forums and ultimately with Governor Miller himself. Governor Miller included $300,000 for Peach State in his Fiscal Year 1996 budget bill. On March 17, 1995, petitioner voted in favor of that legislation without disclosing either her control of or financial interest in Peach State. Gov't C.A. Br. 12-13.

In July and August 1995, petitioner arranged for Peach State to hire three full-time paid staff whose salaries she set. The staff worked in extra space in the Department's Atlanta offices, but Peach State's finances were handled from Savannah. As with Greater Savannah, Peach State's bank account, although nominally under the control of Wright, was actually controlled by petitioner. Gov't C.A. Br. 13.

On September 1, 1995, the Department entered into a $300,000 contract with Peach State. Pending receipt of the funds, petitioner used Peach State, Greater Savan-

nah, CAA, and even Caucus money interchangeably. On September 7, 1995, in her capacity as Caucus Chairman, petitioner wrote a Caucus check for $10,000 to Peach State, without notifying any other Caucus officers. Petitioner then had Peach State pay half of the Caucus money to Greater Savannah, which funneled that $5000 to petitioner's company, where she used it to pay her own taxes. Gov't C.A. Br. 14-15.

On October 23, 1995, the Department contract was amended so that Peach State could obtain the entire $300,000 up front.[2] On November 3, 1995, the Department paid the $300,000 to Peach State. On November 8, 1995, petitioner had Peach State use $10,000 to repay the loan from the Caucus ($5000 of which had gone to her). Starting on that date and continuing periodically for more than a year, petitioner caused another $67,832 to be paid from Peach State through Greater Savannah to CAA, and $2600 to be paid from Peach State to Rainbow School and Office Supplies (Rainbow), another business name that petitioner used. Gov't C.A. Br. 15-16.

Although petitioner performed some services for Peach State, the value of those services was less than the money she paid herself. There were no contracts between Peach State and Greater Savannah, Rainbow, or CAA, and no invoices were submitted before the checks were written. Instead, petitioner decided when and how much she would be paid, and then caused the

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[2] As a condition of that amendment, the organization was required to provide a budget showing how the money would be spent and submit periodic activity and financial reports to the Department. The budget mailed on October 26, 1995, did not mention any payments to or services to be provided by Greater Savannah, CAA, Rainbow School and Office Supplies (another entity controlled by petitioner), or petitioner. Gov't C.A. Br. 5, 15.

payments either by directing Julia Wright to write the necessary checks or writing them herself, faking Wright's signature. Gov't C.A. Br. 16.

In March 1996 and in March 1997, petitioner voted in favor of state budgets for Fiscal Years 1997 and 1998 that included additional funding for Peach State, without revealing her financial interest in that entity. Documents prepared by Peach State to justify continued funding made no mention of Greater Savannah, Rainbow, CAA, or petitioner. Gov't C.A. Br. 18-20.

c. When faced with questions about her scheme, petitioner falsified numerous documents in an effort to conceal her wrongdoing. In March 1996, after news reports questioned her relationship with Greater Savannah, petitioner wrote a letter to Governor Miller and other top state officials criticizing those reports. That letter was sent in the name of Betty Simmons (who knew nothing of it), and petitioner had her assistant forge Simmons' signature. Likewise, in response to questions about the original $5000 contract with the State, Greater Savannah faxed the Department a backdated letter, dated July 29, 1994, that described what Greater Savannah had supposedly done to earn the $5000. That letter, which did not mention petitioner, was sent over the forged signature of Betty Simmons. Gov't C.A. Br. 21.

In early 1997, the State requested an independent audit of Peach State. In response to an auditor's inquiry asking for documentation of payments to Greater Savannah, petitioner created a variety of phony, backdated documents that others signed at her direction. The fake documents included a backdated promissory note for the $10,000 Caucus loan; a backdated letter from Simmons purporting to establish that Peach State's original Executive Director (who was

then deceased) had suggested hiring CAA as a consultant through Greater Savannah; and a backdated set of invoices from Greater Savannah to Peach State. After the auditor traced the state money from Peach State through to petitioner's company, petitioner created a phony, backdated retainer letter from Greater Savannah to CAA. Petitioner also created forged, backdated, inaccurate invoices from CAA to Greater Savannah. Gov't C.A. Br. 23-25.

2. A federal grand jury in the Northern District of Georgia returned an indictment charging petitioner with five counts of defrauding the State of Georgia and its citizens of their right to her honest services and of their money and property through use of the United States mails, in violation of 18 U.S.C. 1341, 1346, and 2. Section 1341, the federal mail fraud statute, prohibits the use of the mails for "any scheme or artifice to defraud"; Section 1346 provides that a "scheme or artifice to defraud" prohibited by Section 1341 includes "a scheme or artifice to deprive another of the intangible right of honest services." During pretrial proceedings, petitioner did not contend that the honest-services theory of mail fraud could not apply to this case because her conduct was lawful under Georgia law. Nor did petitioner seek a judgment of acquittal on the ground that the government's proof at trial failed to establish a violation of Georgia law. In a special verdict form, the jury found petitioner guilty on all five counts, and further found that she intended to defraud the State of Georgia and its citizens of both their intangible right to honest services and their money or property. See Gov't C.A. Br. 3.

3. Petitioner appealed. While acknowledging that she had failed to raise the claim below, see Pet. C.A. Br. 35, petitioner argued that "longstanding principles of

federalism" (*id.* at 40) precluded her conviction for a scheme to defraud the State of Georgia of her honest services because she "fully and timely complied with Georgia's Ethics in Government Act" (*id.* at 37). Citing *United States* v. *Brumley*, 116 F.3d 728, 733-735 (5th Cir.) (en banc), cert. denied, 522 U.S. 1028 (1997), petitioner argued that the mail fraud statute "defines honest services by reference to duties found in state law," and so, absent a violation of state law, she could not be convicted of that crime under the honest-services theory of mail fraud. Pet. C.A. Br. 39. Petitioner also argued that the mail fraud statute was "unconstitutionally applied in this case" because it failed to give her notice that she was required to make any disclosures beyond those required by state law. *Id.* at 41-42.

The court of appeals affirmed in an unreported per curiam opinion. Pet. App. 1a-3a. The court stated that "[t]he mail fraud statute was not unconstitutionally applied, as the duty owed under the honest services provision is a question of federal, not state, law." *Id.* at 3a (citing *United States* v. *deVegter*, 198 F.3d 1324, 1328-1329 & n.5 (11th Cir. 1999), cert. denied, 530 U.S. 1264 (2000)).

ARGUMENT

Petitioner contends that constitutional principles of federalism and due process preclude her conviction under the honest-services theory of mail fraud. Pet. 7-14. Neither contention warrants this Court's review.[3]

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[3] Because the jury convicted petitioner on each count under both an "honest services" and a "money or property" theory of mail fraud, see p. 8, *supra*, petitioner's contention, even if correct, would not affect her convictions. It could, however, affect petitioner's sentence because mail fraud offenses involving a depriva-

1. The federal mail fraud statute, 18 U.S.C. 1341, proscribes the use of the mails in furtherance of "any scheme or artifice to defraud." Before 1987, every court of appeals that had addressed the issue had held that the mail fraud statute reached public corruption schemes intended to deprive citizens of their intangible right to honest services by public officials. See *United States* v. *Paradies*, 98 F.3d 1266, 1283 n.30 (11th Cir. 1996) (collecting cases), cert. denied, 522 U.S. 1014 (1997). In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court held that the mail fraud statute was "limited in scope to the protection of property rights," and it reversed the mail fraud convictions in that case, which had been premised on the theory that the defendants, as public officials, had engaged in a scheme to deprive the citizens of Kentucky of their intangible right to honest government. See *id.* at 360; see also *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987).

In 1988, Congress responded to the decision in *McNally* by enacting 18 U.S.C. 1346, which specifically provides that a "scheme or artifice to defraud" prohibited by Section 1341 includes "a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7603, 102 Stat. 4508. The legislative history of Section 1346 makes clear that Congress intended to overturn the result in *McNally* and to bring within the coverage of the mail and wire fraud statutes schemes to deprive citizens of their intangible right to honest services by public officials. See 134 Cong. Rec.

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tion of the intangible right to honest services of a public official are sentenced under a different Sentencing Guideline (Guidelines § 2C1.1) than offenses involving a deprivation of money or property alone (see Guidelines § 2F1.1).

32,708 (1988) (Sen. Biden); *id.* at 33,296-33,297 (Rep. Conyers).

2. Petitioner contends that her mail fraud convictions cannot rest upon the honest-services theory of Section 1346 because constitutional principles of federalism preclude the application of Section 1341 to state political officials who are acting in compliance with state law. See Pet. 7-14. Petitioner failed, however, to raise that contention in the district court. See pp. 8-9, *supra*. Accordingly, her claim may be reviewed at this time only for plain error. See Fed. R. Crim. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466-470 (1997); *United States* v. *Olano*, 507 U.S. 725, 732-736 (1993). To satisfy the plain-error standard, an error must at a minimum be "clear" or "obvious." *Id.* at 734 ("At a minimum, court of appeals cannot correct an error pursuant to Rule 52(b) unless the error is clear under current law."). Petitioner cannot show any error here, much less any clear or obvious error.

First, neither this Court nor any court of appeals has held Sections 1341 and 1346 to be unconstitutional as applied to a state legislator whose actions did not violate state law. In addition, the Eleventh Circuit, in which this case arose, has ruled that the existence of any duty owed under the honest-services theory of mail fraud is a question of federal, not state, law, so that no showing of a violation of state law is necessary for a conviction under Section 1346. See *United States* v. *deVegter*, 198 F.3d 1324, 1328-1329 & n.5 (1999), cert. denied, 530 U.S. 1264 (2000). Accordingly, the district court's failure to dismiss *sua sponte* the honest-services allegations in the indictment on federalism grounds was not plain error, for such a dismissal was not required by any controlling legal authority in the Eleventh Circuit.

Petitioner's reliance (Pet. 9-11) on the Fifth Circuit's decision in *Brumley*, *supra*, is misplaced. In *Brumley*, the court of appeals concluded that, "[u]nder the most natural reading of [Section 1346], a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law," *i.e.*, "the official must act or fail to act contrary to the requirements of his job under state law." 116 F.3d at 734. *Brumley*, however, was a holding of statutory construction, and although the court did acknowledge "federalism arguments" in reaching its decision that the honest-services theory of mail fraud reaches only state officials who had acted contrary to state law, see *id.* at 735, it did not hold that Section 1346 would be unconstitutional unless it were so limited. See also *id.* at 736 (Jolly, J., dissenting) (arguing that Section 1346 did not reach deprivation of honest services by state officers acting in their official capacities, but also making clear that "we do not at all suggest that the criminal statute at issue is unconstitutional or must otherwise be stricken"). *Brumley* therefore does not support the constitutional claim advanced here by petitioner. Moreover, the Fifth Circuit's limitation of Section 1346 in *Brumley* has not been adopted by any other circuit; all other courts of appeals that have addressed the issue have ruled that proof of a violation of state law is not necessary to a conviction under the honest-services theory of mail fraud.[4]

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[4] See *United States* v. *Sawyer*, 239 F.3d 31, 41-42 (1st Cir. 2001); *United States* v. *Martin*, 195 F.3d 961, 966 (7th Cir. 1999), cert. denied, 530 U.S. 1263 (2000); *United States* v. *Bryan*, 58 F.3d 933, 940 (4th Cir. 1995); see also *United States* v. *Margiotta*, 688 F.2d 108, 123-124 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983);

Petitioner's contention (Pet. 7-9) that the decision below conflicts with *Cleveland* v. *United States*, 121 S. Ct. 365 (2000), is also wide of the mark. In *Cleveland*, the Court concluded that unissued state permits or licenses do not qualify as "property" under Section 1341 even though they may become property in the recipients' hands. *Id.* at 368. In so holding, the Court noted that a contrary ruling "would subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities" and declined to adopt such an interpretation "in the absence of a clear statement by Congress." *Id.* at 373. Nothing in *Cleveland* casts doubt on the federal government's constitutional authority to prosecute state and local corruption by using the honest-services provision of Section 1346. Indeed, the Court specifically noted that "[i]n this case, there is no assertion that Louisiana's video poker licensing scheme implicates the intangible right of honest services." *Id.* at 371. Moreover, because the honest-services provision in Section 1346 was, as noted above, specifically intended by Congress to overturn *McNally* and to restore the federal government's ability to combat public corruption through the mail fraud statute, this Court's refusal to read the term "property" broadly in *Cleveland* has little relevance here.

Second, petitioner cannot show plain error because she has failed to demonstrate that her conduct was consistent with state law. Although petitioner now contends (Pet. 12) that she "fully and timely complied with Georgia's Ethics in Government Act," that assertion was not proven below, and, had it been relevant, would have been disputed by the government. More-

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United States v. *Bush*, 522 F.2d 641, 646 n.6 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976).

over, petitioner ignores the Georgia Constitution, which by its plain terms as well its authoritative construction imposes the full fiduciary duties of trustees upon public officials.[5] Consequently, even if it were proper to examine the scope of petitioner's obligations under state law, her scheme to benefit herself from an undisclosed conflict of interest would support her conviction under the honest-services theory of the mail fraud statutes.

Finally, petitioner's constitutional challenge to Section 1346 is without merit in any event. Petitioner relies on *United States* v. *Lopez*, 514 U.S. 549 (1995), to argue that her mail fraud prosecution exceeded constitutional boundaries. Pet. 11. In *Lopez*, this Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q) (1994), was beyond Congress's power under the Commerce Clause, and observed that "Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise." 514 U.S. at 561. The Court further noted that "[n]either the statute nor its legislative history con-

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[5] See Ga. Const. Art. I, § 2, Para. I ("Public officers are the trustees and servants of the people and are at all times amenable to them."); *Georgia Dep't of Human Res.* v. *Sistrunk*, 291 S.E.2d 524, 528 (Ga. 1982) ("All public officers, within whatever branch and at whatever level of our government, and whatever be their private vocations, are trustees of the people, and do accordingly labor under every disability and prohibition imposed by law upon trustees relative to the making of personal financial gain from the discharge of their trusts."); *Liner* v. *North*, 373 S.E.2d 846, 848 (Ga. Ct. App. 1988) ("As a fiduciary, appellee acquired a number of legal duties[.] * * * Among these duties were the duty to avoid potential conflicts of interest and the duty to give full and fair disclosure in a timely manner of all known things adversely affecting the appellant beneficiaries' rights in the subject matter of the dealings.").

tain[s] express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone." *Id.* at 562. *Lopez* has no application to this case, because a conviction under Sections 1341 and 1346 requires proof that the mails were used in furtherance of the fraudulent scheme. Sections 1341 and 1346 therefore represent a permissible exercise of congressional power under the Post Office Clause, U.S. Const. Art. I, § 8, Cl. 7. See *Badders* v. *United States*, 240 U.S. 391, 393 (1916); see also *Parr* v. *United States*, 363 U.S. 370, 389-390 (1960).

2. Petitioner also contends that Section 1346 is unconstitutionally vague because it failed to provide her with notice that her conduct was criminal. Pet. 11-13. That claim also lacks merit. The void-for-vagueness doctrine, rooted in the Due Process Clause, requires that a criminal statute give "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States* v. *Harriss*, 347 U.S. 612, 617 (1954). As this Court has explained, in evaluating claims that a statute's proscriptions are unconstitutionally vague, "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States* v. *Lanier*, 520 U.S. 259, 267 (1997); see also *Brumley*, 116 F.3d at 732 ("Gauging fair notice requires an inquiry into the state of the law as a whole, not merely into the words printed on a single page of the United States Code.").

Due process was satisfied here because, both before and after *McNally*, the relevant case law made clear that public officials who seek to gain from undisclosed conflicts of interest may be prosecuted for honest-services fraud. See, *e.g.*, *United States* v. *Grandmaison*, 77 F.3d 555, 566-567 (1st Cir. 1996); *United*

States v. *Waymer*, 55 F.3d 564, 571-572 (11th Cir. 1995), cert. denied, 517 U.S. 119 (1996); *United States* v. *Silvano*, 812 F.2d 754, 759-760 (1st Cir. 1987); *United States* v. *Keane*, 522 F.2d 534, 549 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); see also *United States* v. *Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996) ("The cases in which a deprivation of an official's honest services is found typically involve either bribery of the official or her failure to disclose a conflict of interest, resulting in personal gain."). In addition, Section 1341 protects defendants from criminal liability for an innocent or accidental failure to disclose a conflict of interest by requiring that the jury find a specific intent to defraud beyond a reasonable doubt. See *Paradies*, 98 F.3d at 1282-1283; *Waymer*, 55 F.3d at 568-569. Such a requirement of specific intent to engage in an act that is *malum in se* does much to "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U.S. 91, 102 (1945) (plurality opinion). Accordingly, the district court did not err, let alone plainly err, in failing to dismiss the honest services charges against petitioner on due process grounds.[6]

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[6] There is likewise no merit in petitioner's suggestion that her prosecution implicates First Amendment interests as well. See Pet. 13. Petitioner was not prosecuted for "her advocacy and votes on legislation." *Ibid.* She was prosecuted for engaging in a scheme to use her political influence to funnel state money to organizations that she secretly controlled. Such conduct is wholly unprotected by the First Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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